IN THE

Supreme Court of the United States

October Term, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

v.

HOLT, RINEHART & WINSTON, INC. and JACK NEWFIELD,

Respondents.

BRIEF FOR RESPONDENT HOLT, RINEHART & WINSTON, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 7, 1977

INDEX

Citations

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Respondent Holt, Rinehart & Winston, Inc. (hereinafter "Holt") respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the judgment entered in this case on July 14, 1977 by the Court of Appeals of the State of New York.

The following abbreviations will be used in respondent Holt's brief:

Pb- —petitioner's brief.

A- —petitioner's appendix.

R- —respondents' joint appendix on appeal in the Court of Appeals of the State of New York.

Jurisdiction

Petitioner has failed to demonstrate that the Court possesses jurisdiction to review the judgment of the New York State Court of Appeals under 28 U.S.C. § 1257(3).

While it is true that five of the six questions presented for review refer to the Court of Appeals' consideration of issues arising under the First Amendment to the United States Constitution and interpretive decisions of this Court, these questions clearly are not sufficiently substantial to satisfy the jurisdictional requirement.

Question "1." does not present a substantial federal question because the Court of Appeals correctly held that petitioner failed to fulfill his summary judgment burden under state law by omitting to present any probative material evidence opposing the motion on the dispositive issue of Holt's alleged actual malice in publishing *Cruel and Unusual Justice* (hereinafter referred to as *"CUJ"*), (A-29, 30).

Nor do Questions "2." and "3." arise to the level of substantial federal questions. The Court of Appeals' careful analysis of the evidence compelled the findings that petitioner failed to present any probative, material evidence tending to establish the falsity of the charges of "probable corruption" and "suspicious leniency", thus requiring dismissal of the complaint under state summary judgment law. These questions were, moreover, mooted for review purposes here by the Court of Appeals' dispostive ruling that petitioner failed to present any probative, material evidence that Holt published *CUJ* with actual malice.

"Question "4." does not present a substantial federal question because the Court of Appeals' ruling that opinions and not factual omissions are at the root of the action did

not turn on an interpretation and application of *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), but rather on the Court of Appeals' own state law-based decision in *James* v. *Gannett Co.,* 40 N.Y. 2d 415, 424 (1976) that relatively minor omissions from an otherwise basically accurate publication do not create liability.

Questions "5." and "6." do not even present federal questions because neither was considered nor decided by the Court of Appeals. They are further removed from the level of substantiality required to invest jurisdiction because they are based on petitioner's clearly erroneous premise that the defendant in a public official's libel action carries the burden of establishing the truth of the sued-upon publication. Additionally, question "6." is solely directed to the propriety of the grant of summary judgment to Newfield.

Questions Presented

1. Does the Court of Appeals' dispositive ruling render moot the proposed questions of whether petitioner satisfied his constitutional burdens of presenting some evidence to establish the falsity of the charges of "probable corruption" and "suspicious leniency", and clear and convincing evidence of actual malice?

2. Would the Court of Appeals' judgment nonetheless have been correct had It ruled that "probable corruption" and "suspicious leniency" are pure opinion and thus absolutely privileged?

Statement of the Case and Summary of Argument

The Petition before the Court should be rejected on its face as being in clear violation of Supreme Court Rule 23(4). Petitioner's typewritten reconstruction of parts of the record on appeal below is totally inaccurate in one respect which is both substantial and material (Point I, *infra*). Additionally, petitioner's forty-five pages of argument accomplish no more than to burden the Court with a biased, discursive rehash of the evidentiary record below in an attempt to create the appearance of a question of fact as to Holt's alleged actual malice. The inferences on which petitioner's arguments are based are in many respects substantially misleading due to the fact that they are not based on any evidence in the record but merely on petitioner's groundless suspicions (Point II, *infra*).

The writ should be denied for the further reason that the judgment below has no normative importance which transcends the private interests of the litigants. The judgment turned on the Court of Appeals' analysis of the evidentiary record and application of adequate and independent grounds of state law. The judgment, moreover, neither conflicts with any decision of this Court nor decides a federal question which this Court has not but should itself decide. Furthermore, the dispositive ruling of the judgment below was unquestionably correct under both state and federal constitutional law, thus mooting for review purposes the questions presented by petitioner. Indeed, the challenged rulings would have been correct even if the Court of Appeals had adopted rather than rejected respondents' argument below that "probably corrupt" and "suspiciously lenient" are non-actionable opinions (Point III, *infra*).

REASONS FOR DENYING THE WRIT

I.

Petitioner's Appendix' inaccurate reproduction of a substantial and material fact in the Record on Appeal strongly suggests that the writ should be denied [Rule 23 (4).]

Petitioner, a sitting judge, has conceded and all courts below have held that he is a public figure and therefore, in order to ultimately prevail, must produce evidence of Holt's alleged "actual malice" with convincing clarity. Applicable constitutional standards required him to prove, in other words, that Marian Wood—the Holt editor ultimately responsible for the publication of *CUJ*—permitted the book to reach the stands while harboring actual knowledge that it contained substantial, material and defamatory factual falsehoods of and concerning the petitioner, or while in fact harboring serious doubts as to the truth of such facts. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

One of the "facts" petitioner has consistently touted as evidence of Holt's actual malice* is the public disclosure on April 8, 1974 of a report prepared by a special subcommittee of The Association of the Bar of the City of New York which criticized Newfield's treatment of petitioner in the October 16, 1972 *New York Magazine* article "The Ten Worst Judges in New York" (R-474). The article was later republished in *CUJ* (R-390-391).

Petitioner argued below and reiterates here (Pb-43-44) that since the report was disclosed on April 8, 1974 and

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* Others will be analyzed and their lack of probative merit discussed, *infra*, Point II.

CUJ was "published" on April 15, 1974 (Pb-7), Marian Wood had to have prepublication knowledge of the content of the report, thus creating a jury question as to Holt's alleged actual malice. Marian Wood stated in her affidavit supporting Holt's motion for summary judgment, however, that *CUJ* was *actually* "published" (i.e., the book was "on the stands" for public purchase and reading) as early as March 16-18, 1974—approximately three weeks prior to the disclosure of the City Bar Association's report. She stated further that April 15, 1974 was merely the "official" publication date of the book which Holt had set for office record and publicity purposes, that she did not see a *New York Times* article announcing the report's disclosure until after the commencement of the instant action and that she has never seen a copy of the report itself (R-348-349, 500). Petitioner presented no evidence to rebut these statements.

In petitioner's appendix, however, the date *March* 16-18, 1974 has been inaccurately reproduced in such fashion that a reader unfamiliar with the record would necessarily conclude that *CUJ's* actual publication date *followed* the disclosure of the City Bar report by more than one month:

> ". . . bookstores received copies for retail sale sometime during the period of *May* 16-18, 1974." (A-274; emphasis supplied.)

The extra space following the typewritten word "May" as it appears in petitioner's appendix, coupled with the presence of the letter "y" on a slightly higher horizontal level than the letters "Ma", clearly suggest that in its original version petitioner's appendix did in fact contain "March" instead of "May", but was for some reason altered.

Holt ventures no guess as to the reason or reasons why this substantial and material inaccuracy appears in the appendix presented to the Court. We do, however, respectfully submit that standing alone this serious inaccuracy constitutes a sufficient reason for denying the instant petition under Rule 23 (4).

II.

The writ should be denied because petitioner's questions presented for review and arguments constitute no more than misleading and suspicious inferences unsupported by any evidence in the record.

The Court of Appeals of the State of New York undertook and correctly exercised its clear responsibility under the U.S Constitution. The Court below closely reviewed the evidentiary record in this case in order to determine whether respondents' First Amendment rights had been adequately secured by the lower courts. *Hotchner* v. *Castillo-Puche,* 551 F. 2d 910, 912 (2d Cir. 1976), *cert. denied,* 43 U.S.L.W. 3202 (October 4, 1977). Petitioner has not challenged the Court of Appeals' finding, based on that analysis, that the majority of the sued-upon statements are absolutely-privileged opinions.*

The Court of Appeals' state law-based rulings that petitioner failed to carry his burden of presenting some evidence of Holt's alleged actual malice as to the assertedly "factual" statements that petitioner was "suspiciously lenient" and "probably corrupt" also rest upon that Court's analysis of the evidentiary record and thus for that reason alone should not be reviewed here. *See, United*

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* That the statements sought to be reviewed here also could be correctly viewed to fall within that category will be shown in Point III, *infra.*

States v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918); *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U.S. 430, 433-434 (1917).

Only where a state court judgment has been based on a shockingly wrong analysis of the evidentiary record, thus creating substantial due process questions, has this Court ever deviated from the above-referenced policy of declining to review a state court decision which turned on its own facts and the application of an independent and adequate state law ground.

This is clearly not such a case. *Compare, Thompson* v. *City of Louisville*, 362 U.S. 199 (1960). Petitioner has not and cannot assert a violation of the due process clause of the Fourteenth Amendment because it is he, and not respondents, who had the burden of proof and totally failed to carry it. Furthermore, as Holt will show *infra*, Point III, the dispositive ruling on actual malice was totally correct under the decisions of this Court as well as under the independent and adequate state law ground for its making.

In the event that the Court nonetheless feels that the evidentiary analysis undertaken by the Court of Appeals might have been in error, Holt will demonstrate the contrary by reviewing the more flagrant examples of petitioner's misuse of the record to concoct the inferences of which the questions presented are wholly comprised. In so doing, yet another serious example of petitioner's failure to accurately portray the record as required under Supreme Court Rule 23(4) will be revealed.

In the third and fourth questions presented for review (Pb-3) petitioner asserts, contrary to the record, that respondents have "admitted" that the charge of "suspicious leniency" was based on "four specific cases", insinuating that the record contains no other supportive evidence on which respondents relied. Petitioner's assertion in Question "5." that respondents presented "nothing" on their summary judgment motions to support the charges of "toughness" (etc.) is similarly contrary to the record.

In publishing the charge of "suspicious leniency" respondents also relied on

> (1) Newfield's review of the files prepared by the Joint Committee on Crime of the New York State Legislature containing a review of felony narcotics dispositions by petitioner which the Committee felt warranted scrutiny (R-615-617, 621-624);
>
> (2) That Committee's public hearing at which petitioner's dispositions in felony narcotics cases were criticized (R-329, 426);
>
> (3) A *New York Daily News* article and editorial on the hearing (R-426-427);
>
> (4) An article authored by *New York Times* reporter Nicholas Gage and published on August 25, 1972 which criticized petitioner's handling of the *Agro* case (R-422-425, 590);
>
> (5) Newfield's conversations with Joseph Hynes and Jerome McKenna* (A-508-509, 516, 586-587);
>
> (6) Petitioner's indictment (A-280-286);
>
> (7) Newfield's interviews with lawyers, judges and law enforcement officials in New York City who

* At the time Newfield interviewed them, Hynes was Chief Assistant District Attorney in Brooklyn in charge of the Rackets Squad and McKenna was Chief Counsel to the State Legislature's Joint Committee on Crime (R-328, 516).

gave the author their critical views of petitioner in confidence (R-516, 586, 590);

(8) Petitioner's admission in his testimony in the prior action that he gave Glover an illegal sentence (*cf.* R-419, 706-709).

Holt relied not only on its knowledge of the foregoing facts, but also on Newfield's substantial professional reputation for accuracy and honesty. Holt assuredly was entitled to fully rely on Newfield's reputation absent some substantial reason to doubt the accuracy of the articles or the bona fides of their author. (R-317-321, 328-332, 341-342, 353, 356-360.) *See* Point III, *infra.*

Petitioner then falsely asserts (Question "4.", Pb-3)* that Holt "purposefully omitted" from *CUJ* reference to the fact that assistant district attorneys "consented" to and "recommended" the "dispositions" in the *Burton, Glover, Vario* and *Agro* cases. The record below clearly shows that Marian Wood was never aware of these omissions prior to *CUJ*'s publication (R-356-494). More significantly, perhaps, the record shows that the assistant district attorneys in *Agro* and *Vario* neither "recommended" nor "consented" to "dispositions" (*i.e.*, the allegedly lenient *sentences* for which petitioner was criticized)—only the pleas (R-215-255, 256-279).** The Court of Appeals cor-

* This false assertion is repeated at Pb-11, 12 and 36.

** Petitioner omits to inform the Court that in his deposition at bar he admitted that the real reason he gave Agro a suspended sentence was that he felt he had to fulfill a "promise" for such disposition to Agro's attorney, even though at the time of the sentencing petitioner knew that the "consideration" for the promise was nonexistent (R-728-731). Petitioner's testimony in his depostion in the prior action that the district attorney requested a suspended sentence is supported only by petitioner's unsubstantiated statement (see Pb-18) and is belied by the fact that only the defense attorney appeared at Agro's sentencing (R-278, A-279). The Gage article certainly does not assert that the district attorney "recommended the sentence" (Pb-34, see R-422-425).

rectly suggested that Newfield was within the bounds of responsible journalistic comment in criticizing petitioner for his dispositions in *Glover* and *Burton* because regardless of the respective assistant district attorneys' "consents" to a suspended sentence and parole, petitioner had the final responsibility for securing substantial justice under the egregious circumstances present in those cases, and could even have done so in *Glover* in a legally correct manner (A-16, 30).

At Pb-5 petitioner inaccurately asserts that the Brooklyn Bar Association "found" that Newfield's charges were "false". The Association, by a "committee" of one attorney, merely concluded that the articles were false (A-205). Even cursory review of the text of the report shows that it fails to designate any material facts of and concerning petitioner published in the original articles which were in fact inaccurate.

The Morello Letter referenced at Pb-6 was never divulged to Marian Wood (R-44,45,47). The reason for its existence, moreover, is very much open to question (R-191). Indeed, all other asserted "evidence" of "omissions" and the like claimed by petitioner to have been known to Marian Wood prior to *CUJ*'s publication on March 16-18, 1974 simply never came to her attention.

For example, petitioner asserts (Pb-8) that Newfield gave Wood a copy of a May 16, 1973 *New York Times* article announcing the commencement of petitioner's prior action against *The Village Voice.** The inference petitioner draws from this "fact" is that Wood thus knew prior to *CUJ*'s

* In connection with this assertion, petitioner claims that Newfield "told" Wood to contact Victor Kovner, Esq., Newfield's counsel, about the prior suit. Newfield did no such thing. He gave Wood Kovner's number *in the event* she had any questions about the prior suit. She never did (R-338, 343, 493-494, 558-559).

publication that the prior suit was based on assertions of the falsity of the original *Voice* and *New York Magazine* articles and that this knowledge constituted a substantial reason for Holt to doubt their accuracy (*see, also* Pb-29). Wood, however, denied under oath ever having seen the said article, and Newfield corroborated her statement (R-492, 512; *see* R-331-332). Moreover, the article accurately describes the prior action as one based on the alleged falsity of an advertisement, *not* on the alleged falsity of the articles (R-491-492, 538).

Another example of the liberties petitioner has taken with the record is his assertion that Holt "knew from the court minutes in *Glover* that Glover was in jail for five years." (Pb-11). The only evidence in the record relating to what Ms. Wood knew about the *Glover* case absolutely negates the assertion: she knew nothing about Glover's 5-year sentence (R-356) and has never seen any of the pleadings, deposition transcripts or evidence produced in the prior action (R-44-45, 538-544, 557-558).

Petitioner's five-page "explanation" of his indictment (Pb-19-23)* is fraught with inaccurate and misleading inferences and record references. For example, while the grand jury did not specifically indict petitioner for "corruption" (see Pb-20) they did indeed indict him on one count of obstruction of justice and three counts of perjury (R-280-286); allegations of serious malfeasance in office which any layman could reasonably equate to "probable corruption". Petitioner also asserts that respondents published the charge that he was "probably guilty" (Pb-23). This assertion is an outright falsehood which again violates Rule 23(4) of this Court. Furthermore, the indictment "explanation" carries the insinuation that Marian Wood had prepublication knowledge of the fine distinctions petitioner draws. This insinuation is also negated by the record, which shows that Ms. Wood never had access to the indictment before or after the publication of *CUJ* (R-44-45, 49).

* The indictment was pending at the time of *CUJ*'s publication.

Petitioner's most unsupportable misuse of the record (Pb-42-45) is the argument that since an estoppel defense set forth in Holt's answer at bar contains "admissions" that respondent "knew of" the prior suit in April of 1973 and "relied on" petitioner's deposition testimony therein, Holt can be charged with knowledge that the prior suit attacked the articles as false, and that in his deposition in the prior action petitioner showed the articles to be false, thus presenting a jury question as to actual malice.

Respondents attacked this argument below as a constitutionally inappropriate "technical" hook on which to hang a finding that some evidence of Holt's alleged actual malice had been produced.* Still using this discredited thesis, however, petitioner tells the Court that he thinks it "hardly plausible that . . . Holt would not, as it admitted it did, obtain a copy (of petitioner's deposition)." (Pb-42)

The record provides an uncontradicted contrary answer to petitioner's wishful thought. Marian Wood testified that she never saw any of the pleadings or evidentiary materials in the prior suit (R-338-339, 342-343, 539, 542), and knew only what Newfield had told her about it—that the prior suit involved only an advertisement and that in his deposition in that case petitioner had admitted the truth of all the factual assertions contained in the original articles (R-342, 543). Thus the "admissions thesis", as the Court of Appeals apparently found, failed to present a scintilla of material evidence probative of Holt's alleged actual malice.

* The Court of Appeals' apparent rejection of petitioner's "admissions thesis" was correct. Admissions in the pleading of one defense cannot be used against the pleader in the adjudication of a separate claim or defense. 31A C.J.S. *Evidence*, § 302, pp. 776, 777; 4 *Wigmore, Evidence*, § 1064(2)(2), pp. 70, 71.

III.

The writ should be denied because the Court of Appeals' dispositive "actual malice" ruling as to Holt was clearly correct under both State and Federal Constitutional Law and under a further constitutional ground not adopted below.

A. State Law:

Rule 3212 of the Civil Practice Law and Rules of the State of New York, and New York State decisional law interpreting the statutory summary judgment procedure, require entry of judgment for the movant where the opposing party is found to have presented no evidentiary facts capable of raising a jury question on a dispositive issue. *Shapiro* v. *Health Insurance Plan,* 7 N.Y.2d 56, 60-61, 64 (1959); *Trails West, Inc.* v. *Wolff,* 32 N.Y.2d 207 (1973); *James* v. *Gannett Co. Inc.,* 40 N.Y.2d 415 (1976).

Under these guidelines, petitioner's affidavit opposing respondents' summary judgment motion (R-436-459) was found to be insufficient as a matter of law. The opposing affidavit contains the same type of rambling, discursive hash of factually unsupported assertions, denials, conjectures and suspicion that fill this Petition. Thus the Court of Appeals was unquestionably correct in finding that petitioner had presented no evidence of falsity, or of Holt's alleged actual malice, thus requiring reversal of the clearly erroneous decisions below and the entry of summary judgment for Holt.

B. Constitutional Law:

The judgment presented for review also is in complete accord with the guidelines set down by this Court in its decisions delineating the extent to which the First Amendment protects the media in publishing factually false reports

regarding public officials. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Assuming *arguendo* that petitioner established the falsity of published material facts of and concerning him, he still cannot prevail on this record as a matter of law because it is nonetheless clear that he presented *no* evidence that Marian Wood acquired prepublication knowledge of specific instances of literal or factual falsehood. Thus the Court of Appeals was correct in finding that there was no evidentiary basis in this record for a jury inference that Holt published with a high degree of awareness of probable falsehood. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Gilberg* v. *Goffi,* 21 A.D.2d 517, 526 (App. Div. 2d Dept. 1964), *aff'd* 15 N.Y. 2d 1023 (1965), (A-29, 30, 46).

Holt did, of course, concede that Marian Wood had prepublication knowledge of the conclusions reached in the Brooklyn Bar Association report. Since, however, an appellate court's constitutionally-required review of the record seeks evidence capable of illuminating the defendant's subjective state of mind on the issue of actual malice (*St. Amant* v. *Thompson, supra,* 390 U.S. at 731-732), mere proof that Holt knew of the report's conclusions is not sufficient standing alone.

The Court of Appeals properly analyzed all the evidence on this issue and correctly concluded that Ms. Wood's stated reaction to her acquisition of knowledge of the report's conclusions—her disbelief in the veracity of the report based on Newfield's statement to her that the report was biased, unfair and politically inspired, coupled with the confirmatory effect of her learning of plaintiff's indictment (R-345, 355-358, 496-499)—demonstrated as a matter of law that the report did not constitute a substantial reason to doubt the accuracy of Newfield's articles or his bona fides as a reporter (A-29). Thus the dispositive ruling of the Court

of Appeals as to Holt also turned on that Court's constitutionally correct analysis of the pertinent evidence. Again, this fact should be deemed to effectively immunize the judgment below from further review here. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

Under the most rigorous constitutional analysis the judgment below clearly conforms to the rulings of this Court. No decision of this Court has ever intimated that in a libel case where First Amendment considerations are concededly paramount due to the plaintiff's "public official" status, a trial must ensue to permit a jury to determine whether to wholly reject the sworn, uncontradicted, exculpatory testimony of the defendant on the issue of actual malice where the prospective trial record contains no evidence capable of establishing the constitutionally-required "guilty" state of mind. Indeed, this Court has consistently ruled to the contrary. *See New York Times Co.* v. *Sullivan,* 370 U.S. 254, 285-286 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

The correctness of the Court of Appeals' judgment as to Holt is further supported by the facts that the Brooklyn Bar report contained no demonstration that the original articles contained any factual inaccuracies of and concerning petitioner (R-181-189), and that Marian Wood had no prepublication knowledge of the three immaterial inaccuracies the original articles in fact contained (A-17; R-557-558, 538, 544). The Court below was also correct in ruling that Marian Wood was constitutionally entitled to credit Newfield's rejection of the Brooklyn Bar report's conclusions rather than the conclusions themselves [A-30; *cf., Time, Inc.* v. *Pape,* 401 U.S. 279, 290-292 (1971).]

C. The Opinion Privilege:

The correctness of the judgment below rests also on a clearly applicable and constitutionally permissible premise for reversal and entry of summary judgment for Holt which was not adopted by the Court of Appeals.

The Court below declined to adopt Holt's argument that the statements "probably corrupt" and "suspiciously lenient" were "pure" opinion and thus absolutely privileged under the First Amendment [*Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339-340 (1974); *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* — U.S. —, 97 S.Ct. 785, 786 (1977); Restatement, Second, Torts, § 566] because the Court of Appeals held that these statements implied criminal conduct.

The Restatement rule and the *Buckley* decision, *supra,* do not delimit the scope of absolutely privileged opinion to only those statements which do not assert corrupt conduct. Indeed, the only stated condition precedent to qualifying for the absolute privilege is that the defendant also published true facts supporting the opinion, as respondents did in *CUJ.* A media commentator's view that a public official or candidate for public office is "probably corrupt" where the commentator holds information that at the time of the publication a special state prosecutor and twenty-three grand jurors thought the official had perjured himself and obstructed justice is an excellent example of the value sought to be secured by the privilege: the right to give one's views freely, robustly and even pejoratively on the fitness for office of a high-level public official. *Cf., Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 968; *Time, Inc.* v. *Pape, supra,* 401 U.S. at 291.

Additionally, it seems clear that under both *Buckley* and the Restatement the Court of Appeals would have been

correct in ruling that the statement "(petitioner) is corrupt" is an opinion because "corrupt" is subject to many different shades of meaning and cannot be proved true or false with absolute certitude. *A fortiori,* "probably corrupt"—a phrase of much looser, more figurative meaning than "corrupt"—can be held to be an absolutely privileged opinion with complete constitutional correctness.

In the premises, it seems clear that the Court would have approved a ruling by the Court of Appeals that the subject statements come within the scope of the absolute privilege announced in *Gertz, supra,* 418 U.S. at 339-340.

IV.

The writ should be denied as to Question "4." because it does not present a substantial federal question, and as to Questions "5." and "6." because they present no federal questions.

Question "4.":

Petitioner asserts that the Court of Appeals incorrectly interpreted and applied *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) in ruling that respondents' "knowing" omission from *CUJ* of the "consent and recommendation of the district attorney" did not constitute evidence of actual malice. Several problems raised by this assertion are overlooked by petitioner.

Firstly, the only evidence in the record relevant to Holt's "knowledge" of the "omissions" is, again, Marian Wood's sworn testimony that she had *no* prepublication knowledge of them (R-356, 494).

Secondly, the Court of Appeals neither "interpreted" nor "applied" *Tornillo.* The Court below merely quoted

from the decision to support the correctness of a ruling which was actually based on the holding in *James* v. *Gannett Co. Inc.,* 40 N.Y. 2d 415, 424 (1977) that relatively minor omissions from an otherwise factually accurate report do not create liability under the common law of libel of the State of New York (A-31).

Thirdly, the Court of Appeals rejected petitioner's contention that the respondent's omission to publish the district attorney's "consents" (shown *supra* to have been somewhat less significant than petitioner, preoccupied with vindication, views them to be) constitute the gravamen of the action (A-32). Thus the ruling that the opinions published *do* constitute the gravamen of the action, coupled with petitioner's omission to challenge the Court of Appeals' rulings with respect thereto, render question "4" not sufficiently substantial to warrant review.

Questions "5." and "6.":

The Court can search the record from cover to cover and find nothing to support the insinuation carried by these questions that the proferred issues were either considered or decided below. Moreover, question "6" is addressed solely to respondent Newfield.

Additionally, both questions are grounded on the erroneous premise that in a public official's libel suit, the defendant bears the burden of establishing the substantial truth of the sued-upon charge as required under the common law defense of justification. As this Court has made abundantly clear, the opposite is true: the public official plaintiff bears the burden of proving that the defendant published false, material and defamatory statements of fact of and concerning him. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285-286 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, CARLETON G. ELDRIDGE, JR., a member of the Bar of this Court, hereby certify that on the 7th day of November, 1977, three copies of the Brief for Respondent Holt, Rinehart & Winston, Inc. in Opposition to Petition for a Writ of Certiorari were mailed with First Class Postage prepaid, to Counsel for Petitioner, Irwin N. Wilpon, Esq., 135 Willow Street, Brooklyn, New York 11201 and three copies were mailed to Counsel for Respondent Jack Newfield, Victor A. Kovner, Esq., 30 Rockefeller Plaza, New York, New York 10020.

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